Supreme Court, U.S.
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No. 95

SUPREME COURT OF THE UNITED STATES

October Term, 1995

MARION FARRELL NOONE et al.,
Petitioners,

v.

NEW ENGLAND TELEPHONE COMPANY et al.,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

PETITION FOR WRIT OF CERTIORARI

Marion Farrell Noone, Joseph F. Noone Jr., Peter J. Noone, Joseph F. Noone III, Bonnie Noone, Kevin Noone, Elaine Bogart, Roger Farrell, Stanley Malek Jr.,Linda Mowduk, Steven Sadusky, Rodney E. Smith, Stephen J. Wachtler.

All PETITIONERS ARE PRO SA

Questions Presented

1. Do the lower courts need instructions to enforce the Federal Rules of Civil procedure and prior determinations with regard to the following:

a: Whether or not the District Court properly ruled upon the issue of Statute of Limitation in granting Summary Judgement.

b: Whether or not the District Court properly allowed for the consideration of material facts and a genuine issue for trial did apply.

c: Whether or not upon the consideration of the aforementioned complaint, the District Court properly ruled on Summary Judgement for all Respondents even those that never answered the complaint and were in default.

Pursuant to Federal Rules of Civil Procedure 56. and properly dismissed the complaint asserted by the Plaintiffs.

PARTIES TO THE PROCEEDING

The Petitioner Linda Mowduk a citizen of the United States, living in the of Massachusetts.

The Petitioner Joseph F. Noone III a citizen of the United States, living in the State of Massachusetts.

The Petitioner Bonnie Noone a citizen of the United States, living in the State of Massachusetts.

The Petitioner Steven Sadusky a citizen of the United States, living in the State of Massachusetts.

The Petitioner Kevin P. Noone a citizen of the United States, living in the State of Massachusetts.

The Petitioner Elaine Bogart of the ("Y" Pharmacy) a citizen of the United States, living in the State of Massachusetts.

The Petitioner Stanley Malek Jr. a citizen of the United States, living in the State of Massachusetts.

The Petitioner Peter J. Noone a citizen of the United States, living in the State of New York.

The Petitioner Roger P. Farrell (Rapp Auto) a citizen of the United States, living in the State of New York.

The Petitioner Joseph F. Noone Jr. a citizen of the United States, living in the State of New York.

The Petitioner Stephen J. Wachtler a citizen of the United States, living in the State of New York.

The Petitioner Marion Farrell Noone a citizen of the United States, living in the State of New York.

The Petitioner Rodney E. Smith (Rons Health Food Store) a citizen of the United States, living in the State of West VA.

RESPONDENTS

Respondent, New York Telephone Company, and employees, incorporate in the State of New York and Massachusetts. Represented by Attorney Pamela A. Smith

Respondent, New England Telephone Company and employees incorporated in the State of New of Massachusetts. Represented by Attorney Pamela A. Smith

Respondent, Middleburgh Telephone Company, and employees incorporated in the State of New York. Represented by Attorney J. W. Woodard

Respondent, Master Detective Agency Incorportate and license in the State of Massachusetts.

Respondent, Tony Frost Private Investigator a citizen of the State of the United States.

Respondent, Kenneth Varraile, Thomas Lyster, Paul Flynn, Mark Marhar, Martin Marchinacik, Paul Desmond. Represented by Assistant U. S. Attorney Susan Winkler.

Respondent, Harry Miles a citizen of the United States. Represented by Attorney Callahan.

Respondent, James Collins a citizen of the United States. Represented by Attorney Callahan.

Respondent, Kenneth McPhee a citizen of the United States. Represented by Attorney C. J. Savoie.

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All PETITIONERS ARE PRO SA

SUPREME COURT OF THE UNITED STATES

October Term, 1995

MARION FARRELL NOONE, at el.,
Petitioner,

v.

NEW ENGLAND TELEPHONE COMPANY, et al.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

The Petitioners, Marion Farrell Noone et al., respectfully pray that a Writ of Certiorari issue to review a Judgment of the United States Court of Appeals for the First Circuit Eastern Massachusetts.

OPINIONS BELOW

On October 21, 1994, the United States District Court for the First Circuit granted a Motion on behalf of the Respondents et al., for Summary Judgement. Thereafter, the District Court for the Eastern District of Massachusetts reversed its own decision, on Statute of Limitation and Default Judgement..... (C-1)

Also denying Petitioners's their Claim for Relief.

All these matters were raised upon an appeal which was denied by the United States court of Appeals on June 8, 1995.

The Court of Appeals

Per Curiam

"We affirm essentially for the reasons stated in the districts court's memoranda and orders, dated February 23, 1994, June 8, 1994, and October 20, 1994."

Affirmed.....(D-1)

JURISDICTION

This Court has jurisdiction to review the decision by Writ of certiorari under 28 U.S.C.A. 1254 (1)

STATUTORY PROVISIONS

The District Courts shall not denie Petitioners default judgement and apply Rule 56 when service was proper and correct.

The Petitioners were within the three (3) year Statute of Limitations. Mass Gen Law GL c. 272 Sec 99.

Also to denie relief, where a plain, speedy and efficient remedy may be held in the courts of such state. Title 18 2520. (a) (b) (1) (2) (3).

STATEMENT OF THE CASE

On April 22, 1992 thirteen (13) Plaintiffs filed a Civil action Pro Sa in the United States District Court Eastern District of Massachusetts.

Plaintiffs filed this Civil Action for declaratory, injunctive relief and to award money damages. Jurisdiction is grounded upon Article III and the First, Fourth, Fifth, Sixth and Eight, Amendments to the Constitution of the United States of America; Title 28 U.S. Section 1331, 1343, 2201: Bivens v. Six Unknown Agents of the Federal Bureau of narcotics, 403 U. S. 388, 91 Sec. 1999, 29 Led. 2d 619 (1971): and the pendent jurisdiction of this Court to review actions alleged to be a violation of State Law yet relievable by a Federal

Court. United Mine Workers v. Gibes. 383 U.S. 715, 86 Sec. 1130, 16 Led. 2d 218 (1966). Title 18 Sec. 241 & 242 Title 42 1983.

Venue in the United States District Court for the Eastern District of Massachusetts proper pursuant to Title 28 US. Sec 1391 (e) 1395 and 1402.

This Civil Action arising out of a Criminal Investigation conducted by six (6) Federal agents in February 1988. Three (3) telephone companies one in the State of Massachusetts and two in the State of New York. Three (3) attorneys that represented defendants in the criminal actions and trial. Defendant one of which is a Petitioner in this action.

Also named in the suit was a private investigator and his Investigation Firm, hired in June 1988 by six (6) of the thirteen (13) Petitioners to test several telephone in the Palmer Massachusetts area for electronic surveillance.

.....(F-1)

On July 13, 1988 a grand jury handed down an indictment, against Four (4) of the Petitioners a mother and her three sons for Aiding and abetting in flight to avoid prosecution. Title 18 sec 1074. They were tried April 22, to May 11, 1990. Two of the sons were acquitted, the mother and other son appealed their conviction, the court of Appeals over turned the lower courts conviction. Stating that Title 18 sec 1074 did not apply.

Trial of April 22, 1990 signed statements were submitted into evidence at by the prosecutor. These statements were never seen or given to the four (4) Petitioners or the Attorneys representing two (2) of the Petitioners [at that trial], until the governments witnesses was approaching the stand to testify.

Statement of witness Tina Breault at trial 1990

Stating:

"I received a call on Jan 28, 1988 I, recorded the call."

This signed statement of witnessTina Breault was signed by Tina Breault and witnessed by Agents Varriale and Lyster of the ATF., and Attorney McPhee on January 27, 1988 .....(E-1)

From May 1988 to April 1990 several of the Petitioners friends and relatives complained of telephone problems and notified their telephone

companies.

Petitioners in Massachusetts contracted Master Detective Agency represented by licensed Private Investigator Tony Frost to test the telephones. In June 1988. These testing were positive. Except for the last testing of June 26, 1988.....(F-1)

In the trial of April/May 1990 Respondent ATF., Agent Varriallie testified to having a meeting with P.I. Tony Frost before Frost did

<u>This was the first time the Petitioners knew of any meeting between the government agent and the Private Investigator that they hired to test theirtelephones.</u>

before Frost did the last testing on Petitioners phones on June 27, 1988 in Palmer MA. All five ,(5) of the Petitioners telephones were clean of any Electronic Surveillance. This was the only testing that was not positive on June 27, 1988. .....(F-1)

Respondent Frost was subpoena to testify at the trial in April\May 1990, he left town.

A court order was issued.

Frost never responded, court refused to issue a warrant.

New England Telephone Co. was notified of the Investigators findings.

New England, New York and Middleburgh Telephone Co.s refused to investigate Petitioners complaints. .....(G-1)

During the time from February 88 up to and including the trial. Several friends and relatives offered moral and emotional support to the Four Noones a mother and her three sons. Totally unaware that this Christian act would violate their Rights to privacy and leave a lasting effect also on their lives. ...(I-3) (J-1/3)

Petitioners starting experiences difficulties with their telephones. Several complaints were made to the three different telephone companies, their was no relief it became more then obvious their was something seriously wrong.

October 88 Petitioners hired a second Private Investigator more testing were done in New York..(H-1) These testings were found to be positive on the Petitioners telephones

November 1988 Petitioners in Massachusetts had testings done and were found to be positive. ...(H -1)

In March 1990 Electronic Surveillance testings were conducted again on all thirteen (13) Petitioners telephones in New York and Massachusetts all were found to be interfered with. ....(I & J all)

> From the beginning of these testings the Petitioners notified their telephone companies security officers to investigate, and check their telephone lines.

All three (3) telephone companies denied have any knowledge or understanding of any Electronic Surveillance.

> When Subpoenaed to give reports investigation of testings on Petitioners telephones. Telephone Companies refused.

Petitioners the four (4) Noones that were indicted by the grand jury complained to the Federal Superior Court (judge, prosecutor and attorneys) that brought criminal charges against them.

The Prosecutor in several statements and in discovery and at trial Stated:

Their were no Title III warrantsusedin this investigation.

April 22, 1992 Petitioners filed a Civil Action against the Respondents named in this civil action in the U.S. Superior Court for the Eastern District of Massachusetts.

The lower court dismissed Petitioners complaint on a three (3) year Statute of Limitation and granted Respondents Summary Judgment. .(C-1)

The U. S. Superior Court also granted Summary Judgment to Private Investigator Tony Frost.

Tony Frost and his firm Master Detective Agency never responded to Petitioners Complaint and Summons.

Petitioners filed a Complaint in the Superior Court of Eastern Massachusetts on April 21, 1990, their Complaint was amended twice. In October 1994 this

Superior Court denied complaint and granted Summary Judgment to all the Respondents even those that never answered summons and complaint. Petitioners are pro-sa and are not very artful, also dumb of law.

REASONS FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

The First Circuit Court of Appeals refused to find that the District Court failed to consider its own prior ruling on Statutes of Limitations of testimony at the trial, and Electronic Surveillance Testing in 1990 which is well within the Statutes of Limitations. .....(A-1)

The District Court also ruled on Process of service which in its earlier Memorandum ruled it to be proper and according to the Federal Rules of Civil Procedures. .....(A-1)

Memorandum and Order of the Court it findings were that the signed statement and testimony at trial was also within the Statute of Limitation. .....(A-1)

The last Memorandum and Order the Court turned a FRCP 12 (b) 6 in to a Rule 56.1 and granted Summary Judgment to Respondent Tony Frost and the Master Detective Agency which was contrary to the courts previous Memorandum and Order.

The Court improperly dismissed the complaint on Statute of Limitation and the absence of a genuine issue of material facts granting Summary Judgment to the Respondents. Whether the District Court erred as an operation of law by dismissing this case when it though that a Rule 4, Rule 12(b) 6 defense and a Rule 56 are synonymous and granting Summary Judgment.

POINT I

THE FIRST CIRCUIT CURT OF APPEALS AFFIRMED THE SUPERIOR COURTS RULING IN GRANTING SUMMARY JUDGMENT.

The ruling in Memorandums of the lower court was in contradiction to its own prior rulings. .....(A & C)

The lower Court must not be able to selectively enforce the Federal Rules of Civil procedure in a selective manner.

Federal Rule Civil Procedure 56. 1 and Federal Rule Civil Procedure 12 (b) 6. .....(C-1)

POINT II

THE COURT OF APPEALS AFFIRMING THE RULING OF THE LOWER COURT AND DENYING DEFAULT JUDGMENT.

Memorandum and Order of the lower Court granting Default Judgement to the Petitioners. Later reversing their order and granting Summary Judgement to a Respondents that never answered the Complaint or Summons which was properly served by Worchester Process Service.

The manner in which the trial Court ignored FRCP was clearly contrary to the law, and is ample demonstration of a trial Court that selectively enforces the rules and the legal precedent of this Court and with regard to the First Circuit Court of Appeals.

CONCLUSION

This determination of the First Circuit Court of Appeals of June 8, 1995 must be set aside, and the Court instructed to reconsider this matter in conformity with the rules of civil procedure and statutes that have set legal precedents of the court.

Dated: September 1, 1995

AFFIDAVIT OF SIGNATURES

I, hereby affirm that to the best of my knowledge and belief a true and correct copy of this instrument Writ of Certiorari and attached appendix are signed under the pain and penalties of perjury.

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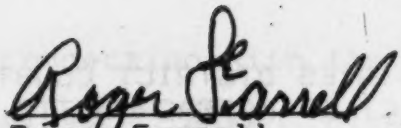

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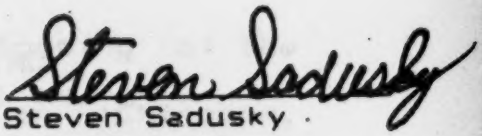

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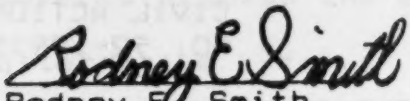

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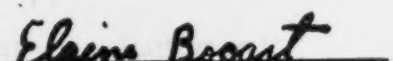

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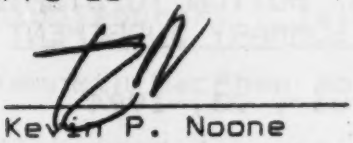

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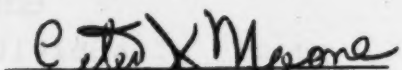

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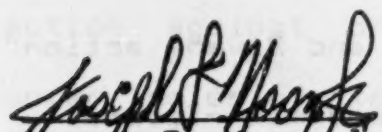

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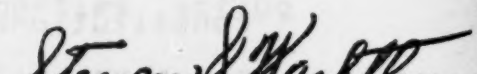

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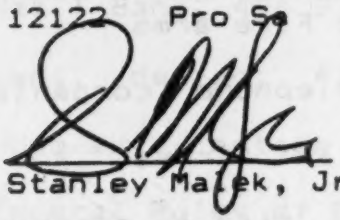

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MARION FARRELL NOONE. et al.,
Plaintiffs,

v. CIVIL ACTION
NO. 92-10935-WJS

NEW ENGLAND TELEPHONE COMPANY, et al.,
Defendants.

MEMORANDUM AND ORDER ON
DEFENDANTS' MOTION TO DISMISS
AND FOR SUMMARY JUDGEMENT

February 23, 1994

SKINNER, SDJ.

The thirteen pro se plaintiffs in this "constitutional tort and Bivens action" allege that the defendants--federal agents from the United States Bureau of Alcohol, Tobacco, and Fire arms ("ATF"), three telephone companies, lawyers from two law firms, and a private investigative firm -- conspired to violate their constitutional rights during an unlawful federal criminal investigation, indictment and trial in

connection with the 1987 bombing of the Plaza Auto Clinic in Chicopee, Massachusetts. The Federal defendants move to dismiss the complaint or in the alternative for summary judgment. Defendants New England Telephone Company, New York Telephone Company, Middleburgh, Telephone Company, and Kenneth MacPhee move individually to be dismissed from this action.

Plaintiffs cannot bring a Bivens action against private parties acting under color of federal law or custom. Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F2d 927, 932 (1st Cir.), cert. denied, 419 U.S. 1991 (1974). However, notice pleading under the Federal Rules of Civil Procedure does not require the plaintiffs to identify the precise legal theory upon which relief is sought. Fed. R. Civ.

P. 8(a). Cf.DiPerri v. Fed Aviation Admin., 671 F 2d 54, 58-59 (1st Cir. 1982) ("generally construing)" allegations to state a claim on a legal theory not articulated in the complaint). On a motion to dismiss, I take the well-pleaded facts as they appear in the complaint, extending plaintiffs every reasonable inference in their favor. Phi v. mass Dept. of Educ., 9 F3d 184, 187 (1st cir. 1993) (citing Coyne v. City of Somerville, 972 F. 2d 440, 442-43 (1st Cir. 1992)).

Service of Process

The federal defendants assert that the claims against Paul Desmond and Pat Haynes must be dismissed for insufficiency of service of process. Desmond denies having been served within 120 days of April 22, 1992, the

date the complaint was filed. See Fed. R. Civ. P. 4 (j). Plaintiffs have produced a photocopy of a domestic return receipt apparently signed by Desmond, dated August 3, 1992, well within the limitations period. The motion to dismiss Desmond from the action is denied.

Plaintiffs attempted to serve Pat Hynes by mail under Fed. R. Civ. P. 4(c)(2)(C)(ii) if a defendant fails to acknowledge receipt of service by mail within 20 days, service must be made personally. Id. Haynes never acknowledge receipt of service, and plaintiffs never followed up their unsuccessful attempt with personal service. Plaitiffs` have produced a photocopy of a domestic return receipt signed by one M. Parker, apparently a clerical

employee in the ATF office in Albany, New York, Hynes, however, is being sued in his individual capacity. There is no indication that M. Parker is "authorized by appointment or by law to receive service of process" for Hynes in his individual capacity. Fed. R. Civ. P. 4(d)(1). Although Hynes eventually received the summons and the complaint (after the 120 day time limit had expired). actual notice of the lawsuit does not constitute service. See Media Duplication Service v. HDG Software, 928 F. 2d 1228, 1235 (1st Cir. 1991) (service rules established " provide bright lines and avoid entangling the courts in ad hoc determinations about whether...actual notice ...was provided"). Hynes is dismissed from this action.

Counts #1-18

The federal defendants argue that "causes of action" #1 through #18 are barred under the statute of limitations that applies to the plaintiffs' self-styled "Bivens claim," i.e., claims inferred directly from the Constitution. Like claims under 42 U.S. C. 1983, Bivens claims are subject to Massachusetts' three-year limitations prior for general personal injury actions, Mass. Gen. L. ch. 260 sec 2A. Cf. Wilson v. Garcia, 471 U. S. 261, 280 (1985) (courts should apply state's general personal injury statute of limitations to 1983 claims): Johnson v. rodriguez, 943 F 2d 104, 107 (1st Cir. 1991), cert. denied, 112 S.Ct. 948(1992) (same). This is the rule in several other circuits. See e.g., Ind,

Constructors Corp. v. United States Bureau of Reclamation, 1994 WL 27254 (10th Cir.) (general person injury statute of limitations applies in both Bivens and 1983 actions); Van Strum v. Lawn, 940 F.2d 406, 409-10(9th Cir. 1991) (same); Bieneman v. City of Chicago, 864 F2d 463, 469-70 (7th Cir. 1988), cert. denied, 490 U. S. 1080 (1989); Chin v. Bowen, 833 F.2d 21, 24 (2d Cir. 1987; McSurely v. Hutchison, 823 F.2d 1002, 1005 (6th Cir. 1987), cert. denied, 485 U.S. 934 (1988).

A federal claim accrues when the plaintiff "knows, or has reason to know, of the injury on which the action is based." Rivera-Muriente v. Agosto-Alicea, 959 F.2d 349,353 (1st Cir. 1992). Because the plaintiffs brought this action on April 22, 1992, any

Bivens claims that accrued before April 22, 1989 would be barred by the three year statute of limitations.

Count #1 alleges that on June 6, 1987, ATF agent Thomas Lyster conducted an unlawful search and seizure in the home of plaintiff Steven Sadusky. Lyster allegedly played carpet cleaner salesman and gave Sadusky a free rug shampoo demonstration. The evidence seized was a bag of "Sadusky Samples" from the demonstration. Count #1 accrued no later then February 17, 1988, when agent Lyster had a second face to face encounter with plaintiff Sadusky; by this time Sadusky should have known that he had been injured. Count #1 is therefore barred by the statute of limitations. Count #2 alleges that on December 26 or 27,

1987, unidentified defendants entered the home of Bonnie and Kevin Noone and interfered with their telephone while other unidentified defendants monitored the line from outside. Almost two years have lapsed since the filling of the complaint, that these defendants still have not been identified or served. The entire complaint is dismiss as to all of the unknown defendants for lack of personal jurisdiction See Glaros v. Perse, 628 F.2d 679,685 (1st Cir. 1980) (citing United States ex rel. Lee v. Illinois, 343 F 2d 120, 120-21 (7th Cir. 1965)) (district court not obliged to wait indefinitely for plaintiff to identify and serve unknown defendants).

Count #3 asserts that on February 17, 1988, ATF agents Varriale and

Lyster, in conspiracy with Harry Miles and James Collins, two attorneys from plaintiff Steven Sadusky "by means of threats and coercion," including "taking his infant son" and "requiring him to participate in 'under cover' work, as a 'nark' for the Federal Government." Amended Complaint PP 22. Count #3 accrued at the latest by February 17, 1988, the day that Sadusky gave his testimony. It is therefore barred by the statute of limitations.

Count #4 alleges that ATF agents Varriale and Lyster conspired with defendants attorney Kenneth Mac Phee to procure a false statement from Tina Breault, a witness in the criminal proceedings. The signed statement, made on January 27, 1988, refers to a telephone conversation with Kevin Noone

that Breault allegedly recorded on day after the statement. Count #4 accrued on or about January 27, 1988 because the plaintiffs should have been alerted to any foul play by the statement itself. Count #4 is barred by the statute of limitations

Count #5 alleges that ATF agents Varralie and Lyster conspired with defendant New England Telephone Company to conduct an "illegal wire surveillance" of telephone conversations between Joseph noone, III and Breault between January 27, 1988 and February 8, 1988. Plaintiffs suspect an illegal wiretap was used on Breault's telephone because she denied having recorded certain telephone conversations that were used at trial. While these allegations might suggest

wrongdoing by the government, they do not make out a claim of conspiracy against New England Telephone. Our court of appeals has made "repeated demands... that there be more then conclusionary allegations [in a complaint], even in civil rights cases." Dewey v. Univ. of New Hampshire, 694 f.2d 1,3 (1st Cir. 1982) (collecting cases). Plaintiffs do not specifically allege any contact between the private and the federal defendants; they simply assume that telephone companies and wiretaps go together. See Glaros, 628 F2d at 685 (requiring conspiracy between government and private entity to be "pled in some detail"). When a complaint omits facts that if they existed, would clearly dominate the [claim], it seems fair to

assume that those facts do not exist." O Brien v. Digrazia, 544 F.2d 543, 546 (1st Cir. 1976), cert. denied, 431 U.S. 914 (1977). Plaintiffs have already amended the complaint twice without curing the defect; I"can only conclude that there is nothing more to be said." Francis-Sobel v. Univ. of Main, 597 F.2d 15, 17 (1st Cir.), cert denied, 444 U.S. 949(1979. See also Fleming v. Line-Waldock & Co., 922 F. 2d 20,23-24 (1st Cir. 1990) (affirming dismissal for failure to state a claim after two opportunities to amend complaint). Count #5 is dismissed with prejudice as to New England Telephone an its individual Officers.

As for the federal defendants, I find that Count #5 could have accrued

at the time of the criminal trial, which began on April 23, 1990/ The prosecutor allegedly stated at trial that no warrants for electronic surveillance were issued during the investigation, This representation could have cause plaintiffs to question the provenance of the Breault taps for the first time. Count #5 cannot be dismissed a time-barred on the pleading alone.

Count #6 alleges that on February 2, 1988, ATF agents told Marion Farrell Noone that her telephone calls were being monitored by the federal government. This claim is clearly timed-barred.

Count #7 asserts that on April 6, 1988, plaintiff Marion Farrell Noone was forced to give self-incriminating

testimony before a federal grand jury that was later used at trial.

Count #7 accrued on the day of testimony, and is therefore time-barred.

Count#8 alleges that from December 1987 through June 1988, the federal defendants monitored and electronically interfered with the telephones of plaintiffs Bonnie Noone, Joseph Noone III, Linda Mowduk, Steven Sadusky and Minnine Anderson. Because they were "known 'subjects'" of the federal defendants' "unwarranted investigation," the plaintiffs suspected government wiretapping and hired a private investigative firm to confirm their suspicions. Count #8 accrued at the latest by June 1988, when the investigative firm allegedly

reported that the plaintiffs' telephones were being monitored, Count #8 is therefore barred by the statute of limitations.

Count #9 alleges that defendant Tony Frost, the proprietor of Master Detective & patrol Agency, the investigative firm hired by the plaintiffs, conspired with the federal defendants to conceal their illegal surveillance, thereby violating "the Plaintiffs' 1st, 4th, 5th, 6th, and 9th Amendment rights." Amended Complaint (prayer for relief pp 48. Frost allegedly gave the ATF agents advance warning of his test; leaked his clients' information to the ATF agents; rendered an inaccurate and late written report of his investigation; and deliberately failed to appear as a witness at the plaintiff' criminal

trial in April - May, 1990. ATF agent Varriale allegedly admitted at trial that Forest shared information with him about the investigation. Id. at PP 83. Based on these allegations, which set forth 'minimal facts... as to who did what to whom and why," Dewey, 694 F2d at 3 plaintiffs have made out a Bivens claim against the federal defendants, and (possibly) a non-Bivens claim against Frost and his agency. Count 9 cannot be dismissed on the pleading as time barred because it appears to have accrued at the time of the criminal trial.

There are other alleged private conspirators named only in the prayer for relief accompanying Count #9; New England Telephone Company and its officers O'Brian and Jacobs. Count #9 is dismissed with prejudice as to New

Admissibility of evidence obtained by wiretapping as effected by

605 of the Federal Communication Act 47 USC 605

Mass GL c. 272 99 is comprehensive statute prohibiting Respondents all of which are subscribers to one of the three telephone companies.

Barrett v. United States, dates back to 1952. Blauer death was in 1953 as a result of a series of injections administered to him by a New York State hospital by Army Chemical Corps as part of an experimental program. The death was actively concealed by Medical Exmainer's death certificate, listed the cause of death as "Coronary arteriosclerosis. According to a "Chronological Statement of Facts". ...The principal concern of the federal representative was protection against disclosure...which, if disclosed, would support a finding of negligence and an award of damages. State of New York, however,did not turn over NYSPI classified records that would have revealed that the injections were part of an Army chemical Corps experimental drug program conducted for chemical warfare research. The estate contends that it was misled by the State into the belief that it had received all relevant hospital records with respect to

Blauer. The army's involvement in the injections and the fact that the mescaline derivatives were furnished as part of its chemical warfare testing program remain secret for 20 years and would have continued to do so but for the public disclosure of these facts by the Secretary of the Army on August 12, 1975.

Plaintiff Elizabeth Barrett, daughter and successor-administratrix of his estate, after filing in an effort to reopen the case in the New York Court of Claims.

Barrett v. State of New York, 85 Misc. 2d 456,378 N.Y.S. 2d. 946 (Ct.Cl.1976)

...Federal jurisdiction was involved against the United States under the Federal Tort Claims Act, 28 U.S.C. 2671, et seq (FTCA), and against the individual defendants under 42 U.S.C sec 1983 and Bivens v. Six Unknown Named Federal Agents 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971. The three actions are

Barrett v. United States et al 76 Civ. 1061

Barrett v. Arthur, et al., 78 Civ. 3762

Barrett v. Hoffman, et al., 76 Civ. 381

It appears that the decision of the court to rule on Statute of Limitations because the Petitioners

failure to raise these claims earlier was improper; Petitioners interprets this court's decision to mean that this court was unable to determine whether plaintiffs had prior knowledge or suspicions of the information it sought by serving a Subpoena Duces Tecum on the New England Telephone Co.

This court should have had an evidentiary hearing. Petitioners requested a hearing, court Memorandum and Order stated a hearing would be in the future.

The Electronic Surveillance testings done in March 1990 were by a license expert private investigator. These testings were well with in the three (3) year statute of limitation, Also because of the many testings in New York and Massachusetts presented to the court, should have been properly addressed at a hearing.

Petitioners were at one scheduled hearing, not recorded in April 1993/ Petitioners were denied Due Process of Law when they were denied information of surveillance on their telephones.

FCC rules are explicit as to right to privacy guide lines and compliance to FCC rules "intentional and unreasonable" invasion "gravity of harm" by the telephone companies and their employees and breach of contract.

England Telephone and its officers for the pleading defects discussed under Count #5.

Count #10 alleges that on July 11, 1988, New England Telephone stated in a letter to plaintiff Linda Mowduk that the company would not confirm or deny the existence of a wiretap at her premises. Mowduk had inquired about a suspected wiretap three days earlier. Count #10 is barred by the statute of limitations because plaintiff should have discovered her alleged injury by july 11, 1988, the date of the letter.

Count #11 alleges that on July 12, 1988 Steven Sadusky was again threatened and coerced to give false testimony before a grand jury by the U.S. Attorney's office and defendants Miles and Collins. Count #11 is barred by the statute of limitations because

it accrued on the day Sadusky gave testimony.

Counts #12 and #13 alleged that on July 13, 1988. ATF agent Varriale used unnecessary force during the false arrest of Joseph Noone, III. These claims accrued the same day and are barred by the statute of limitations.

Count #14 and #15 make no additional allegations regarding the defendants' conduct, but summarize the conditions of bail imposed upon Joseph Noone, Ill, and Marion Farrell Noone as a result of the alleged conspiracy among all the defendants. Because virtually all of the underling claims of conspiracy had accrued by July 1988, Counts #14 and 15 also accrued on the dates bail was imposed -- July 15, 1988 and July 25, 1988, respectively. Counts #24 and 15 are therefore untimely.

Count #16 through #18 allege that from June 1988 until November 19, 1988, some of the plaintiffs continued to experience disturbances on their telephone lines. A second investigative firm allegedly tested the lines and confirmed that listening devices were placed. Counts #16 through #18 accrued at the latest by November 19, 1988 and are therefore barred by the statute of limitations.

Counts #19-28

The federal defendants move to dismiss Counts #19 through 28 on various grounds, including collateral estoppel, failure to state a claim upon which relief can be granted, and qualified immunity. Count #19 alleges in part that plaintiffs were deprived a speedy trial under the Speedy Trial Act. 18, U.S.C, 3161 et seq., as a

result to "the actions of all of the Defendants" related in Counts #1 through 18. The issue of timeliness is precluded by the criminal prosecution because of the district court's ruling that the defendants had been brought to trial within the statutory period. See United States v. Peter Noone, 735 F. Supp. 443, 445 (D.Mass. 1990), rev'd on other grounds, 938 F.2d 334 (1st Cir. 1991). This part of Count #19 is dismissed.

The last paragraph of Count #19 alleges that from May 1989 to March 190, "line disturbances and Ohm Meter Tests on all of the Plaintiffs' telephones continued to indicate interference." Amended Complaint 69. The federal defendants argue that Count #19 in its entirety should be dismissed under Fed. R. Civ. P. 12(b)(6) because

it dies not implicate any of the named defendants.. however, read in conjunction with the allegations of Count #5, 6 and 8 which Count #19 incorporates by reference, Count #19 makes out a wiretapping claim against the federal defendants. Allegations made in a time-barred claim "may constitute relevant background evidence" for other claims Cajigas v. Banco de Ponce, 741 F.2d 464, 470 n. 13 (1st Cir. 1984) (quoting United Air Lines, Inc. v. Evans,431 U.S. 553, 558 (1977).

Count #19 makes no allegations at all against the three telephone companies and their officers, a defect not cured elsewhere in the compliant. The telephone companies and their officers are dismissed with prejudice from Count #19.

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Count #20 alleges that ATF agents Varriale, Lyster, Flynn, Marciniak and Mahar conspired with the New York Telephone Company and the Middleburgh Telephone Company to interfere with and monitor the telephone lines of plaitiffs Marion Farrell Noone, Joseph Noone, Jr., Stephen Wachtler an Rodney Smith. plaintiffs infer the entire conspiracy form "comprehensive analysis and tests" of the plaintiffs' telephones by "electronic wire surveillance experts" on March 3, 1990, which showed that "each of the telephones examined had line interference and disturbance." Amended Complaint 70-71. Count #21 makes essentially the same claim on behalf of the plaintiffs Joseph Noone, III, Linda Mowduk, Bonnie Noone, Kevin Noone, and Stanley Malek, Jr.; this time the

alleged conspirators are ATF agents Varriale, Lyster and Flynn and the New England Telephone Company. Again, neither count sets forth even "minimum factual support of the existence of a conspiracy" between the private and the federal defendants. Francis Sobel, 597 F 2d at 17. Counts #20 and 21 are dismissed with pre judice as to the telephone companies and their officers..

I find, however, that Counts #20 and 21 make out a claim against the federal defendants when read together with the allegations of Counts #4 and 5. The federal defendants claim that no electronic phone surveillance was ever conducted by any of the federal agents. If proved, the background allegation of Counts #4 and 5 would belie this assertion. Given the

clandestine nature of electronic surveillance, plaintiffs have pled the bare minimum of facts necessary to survive a notion to dismiss.

Counts #23 seeks damages from various federal and private defendants for their testimony at plaintiffs' criminal trial. Both government and private witnesses, however, are absolutely immune from liability for testimony in judicial proceedings. Briscoe v. LaHue, 460 U.S. 325, 332 (1983). Count #23 is dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

Counts #22 and 243 through 28 assert that as a result of an alleged conspiracy among all of the defendants, plaintiffs Peter Noone and Marion Farrell Noone were investigated,

prosecuted, held in custody, tried, convicted, and placed on probation under 18 U.S.C. 1074 for fleeing from (and aiding and abetting flight from) the Commonwealth to avoid federal prosecution for illegal use of explosives. both convictions were overturned after our court of appeals held that 1074 does not apply to prosecutions under federal law. See United States v. Peter Noone, 938 F.2d 334 (1st Cir. 1991); United States v. Farrell Noone, 946 F.2d 880 (1st Cir. 1991) (table). Thus, the acts underlying the conspiracy were allegedly "committed under the color of Federal law,' notwithstanding "clearly established Law," and "without Due Process of Law." All of the federal and private defendants are charged with violating the.plaintiffs' First,

Fourth, Fifth, Sixth, Eight and Ninth Amendment rights. Amended Complaint (prayer for relief)120-21,128.

The federal defendants claim they enjoy qualified immunity form Counts #22 and 24 through 28 because the inapplicability of the federal flight statute of federal prosecution was not "clearly established" at the time of the investigation, prosecution, and trial. See Davis v. Scherer, 468 U.S. 183, 193, reh'g denied, 468 U. S. 1226 (1984); United States v. Peter Noone, 938 F.2d at 334 ("the language of [1074], by itself, does not answer the interpretive question before us"). I agree that the federal defendants are immune from liability for their misreading of 1074 (though not, of course, for any patently unconstitutional conduct such as

unlawful wiretapping). Qualified immunity provides "ample room for mistaken judgment" and protects "all but the plainly incompetent who knowingly violate the law:, Hunter v. Bryant, 112 S. Ct. 534, 535 (1991) (quoting Malley v. "briggs, 475 U. S. 335, 343 (1986)).

As for claims outside the federal defendants' qualified immunity, counts #22 and 24 through 28 merely incorporate by reference the wiretapping and other allegations made in previous counts. They state no new claim upon which relief can be granted against any of the federal defendants. The also state no new claim upon which relief can be granted against the private defendants, who cannot be sued for unconstitutional acts under the

color of federal law. Fletcher, 496 F. 2d at 932. Accordingly, Counts #22 and 24 through 28 are dismissed in their entirety under Fed. R. Civ. P. 12(b)(6).

The Motion for Summary Judgment

The federal defendants move in the alternative for summary judgment on all the counts not dismissed either as time-barred or for failure to state a claim upon which relief can be granted. The motion for summary judgment is denied at this time. The federal defendants fail to show that there is no genuine dispute as to any material fact. Fed. R.Civ. P. 56(c). On this record, at least two material facts are disputed: (1) whether the federal defendants monitored the plaintiffs' telephone conversations; and (2) whether any tapes of such conversations

Where the injury took place over a period of time (a continuing wrong"), the statue may not start to run until the end of the period of wrong.
Stuebig v. Hammell, 446 F. Supp. 31 CMP Pa. 1977

Equitable doctrine that in cases of defendants fraud or deliberate concealment of material facts relating to his wrongdoing, time does not begin to run until plaintiff discovers, or by reasonable diligence could have discovered, the basis for the lawsuit:
Fitzgerald. Seamans, 553 F. 2d 220, 228. (D.C. Cir. 1977

The Circuit Court indicated that a three year statute of limitations governed the plaintiff's section 1988 causes of action ruled that: an issue of fact existed as to when the statute of limitations bean to run. The diligence discovery accrual standard was held applicable to both the Federal Tort Claims act and section 1983.
Barrett, v. United States 689 F. 2d 325 (2d 1982)

were made without Tina Breault's participation.

The remaining Motions to Dismiss

In light of my ruling on the federal defendants' motion to dismiss, defendants New England Telephone New York telephone, Middleburgh telephone and their officers and Kenneth MacPhee are dismissed from this action.

Conclusion

Counts #1-4, 6-8 10-18, and 22-28 are DISMISSED. Defendants New England Telephone and its officers O'Brian, Jacobs, Kenton and McManus, New York Telephone and its officers Jalkut and Murphy, Middleburg Telephone and its officers Randal and Barbara Becker, Kenneth MacPhee and his law firm, and James Collins, Harry Miles and their law firm are DISMISSED from this action Counts #19-21 are DISMISSED except as to the federal defendants. Their federal defendants' motion for summary judgment is DENIED

_____

United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MARION FARRELL NOONE, et al.,
Plaintiffs,

v. CIVIL ACTION
NO. 92-10935-WJS

NEW ENGLAND TELEPHONE COMPANY, et al.,
Defendants.

MEMORANDUM AND ORDER ON PLAINTIFFS MOTION FOR RECONSIDERATION, MOTION FOR DEFAULT JUDGMENT, AND SCHEDULE FOR DISCOVERY

June 8, 1994

SKINNER, S.D.J.

In my February 23, 1994 order I dismissed 23 of the 28 counts in this pro se "constitutional tort and Bivens actin." The plaintiffs move for reconsideration.

I dismissed Counts 1, 3-4, 7-8 and 10-18 on statute of limitations grounds. The plaintiffs assert that the alleged conspiracy among the defendants lasted well into April 1990, when the fruits of the defendants' investigation were used to incriminate the plaintiffs at trial. Even assuming that the limitations clock

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would be rewound for this final episode, these allegations have been waived with respect to

the dismissed counts because they do not appear in the complaint. For instance, the plaintiffs now argue that Counts 4 and 11 are timely because they saw the Breault and and Sadusky statements for the first time during the April, 1990 trial. The plaintiffs also assert that they were ordered by the court during the criminal proceedings not make contact with plaintiff Sadusky, who might otherwise have alerted the plaintiffs to his allegedly coerced statement.

These new allegations are supported by a shaft of exhibits exacted to the motion for reconsideration. The plaintiffs have not claimed their new evidence was previously unavailable. "Where evidence is not newly

discovered. a party may not submit that evidence in support of a motion for reconsideration." Lepoer v. Vidockler, 792 F.2d 272, 274 (1st Cir. 1986) (quoting Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3rd Cir. 1985), cert. denied, 476 U.S. 1171 (1986)) (quoting Keene Corp. v. Int'l Fid, Ins. Co., 561 F. Supp. 656, 665-66 (N.D.Ill. 1976) aff'd 736 F.2d 388 (7th Cir. 1984)) ("limited function" of motion for reconsideration is "to correct manifest errors of law or the present newly discovered evidence").

The plaintiffs object to the dismissal of Count 2 a claim against "unknown defendants" for illegal surveillance, because they have not had an opportunity to identify the defendants through discovery. The objection is moot because Count 2 is barred by the statue of limitations. Count 2 accrued by December 27, 2987, the day that the defendants invaded.the Noones' home and

accidentally recorded a portion of their own conversation an the answering machine.

The plaintiffs object to the dismissal of the telephone companies, again arguing that thy have hand an opportunity for discovery. Discovery cannot turn conclusory allegations into a viable complaint. Even on their third attempt, the plaintiffs have failed to plead any details of the alleged conspiracy between the telephone companies and the federal defendants. It is fair to assume that such details do not exist. See O'Brien v. Digarazia, 544 F.2d 543, 546 (1st Cir. 1976), cert. denied, 431 U.S. 914 (1977).

I have considered the plaintiffs' remaining arguments for reconsideration and find them to be without merit.

The plaintiffs move for a default judgment agent Tony Frost and his master Detective & Patrol Agency. It appears that Frost, both in his individual capacity an

as the "agent and person in charge" of the agency, was served by hand by the Worcester County Constable service on September 29, 1992. See Pl. Aff. of Statement for Default Judgment, Ex 3. Frost and his agency have not appeared in this action. Judgment by default shall be entered against both defendants. In accordance with Fed R. Civ. P. 55(a)(2), the plaintiffs' averments an the amount of their damages will be assessed at the time of trial of the remaining counts.

Order

The motion for reconsideration is denied.

Judgment by default shall be entered against defendants Tony Frost and the Master Detective & Patrol Agency.

Discovery shall be limited to the issues underlying Counts 5, 9, and 19-21: whether the federal defendants illegally monitored and recorded.the plaintiffs'

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telephone conversations; and whether they conspired with defendants Tony Frost, the proprietor of the Master Detective & Patrol Agency, to conceal their illegal surveillance.

The parties shall serve their discovery requests on or before June 30, 1994. Responses shall be served on or before July 30, 1994. Any motions relating to discovery disputes shall be filed on, or before August 15, 1994. If no such motions are filed by that date, any dispositive motions shall be filed on or before August 1994, with responsive pleading to be filed on or before September 13, 1994. A status conference will be scheduled thereafter

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United States District Judge

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MARION FARRELL NOONE, et al.,
Plaintiffs,

v. CIVIL ACTION
NO. 92-10935-WJS

NEW ENGLAND TELEPHONE COMPANY, et al.,
Defendants.

MEMORANDUM AND ORDER ON FEDERAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' MOTIONS FOR DEFAULT JUDGMENT AND TO COMPEL PRODUCTION OF TELEPHONE RECORDS

October 20, 1994

SKINNER, S.D.J.

In this rambling a vaporous amended complaint, the thirteen plaintiffs allege, in effect, that federal agents of the Alcohol. Tobacco and Firearms Division of the United States Department of Justice illegally tapped their phones, and that numerous civilian individuals and corporations contributed to the damages which they allege flowed from this violation. The asserted jurisdictional basis for the case is the holding in Bivens

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v. Six Unknown named Agents of the Federal Bureau of Narcotics, 403 U. S. 388 (1971), that the constitution provides a direct right of action for violations of the Fourth Amendment. (Whether such a right of action is precluded by the existence of a statutory right of action under 18 U.S.C. 2520 has not been argued, and in view of my conclusions need not be resolved). Of the claims against the twenty-six originally named defendants and 150 John and Jane Does, all have been dismissed except those against Kenneth m. Varraile, Thomas R. Lyster, Paul Flynn, Paul Desmond, Mark J. Mahar and Martin Marciniak, who were all federal agents, Pat Hines, Private Investigating Firm of Tony Frost and Tony Frost. The federal defendants have filed a motion for summary judgment. The plaintiffs have filed motions for default judgments against the remaining three defendants, who have not filed any responsive pleading. The

plaintiffs also seek to enforce what appears to be a trial subpoena duces tecum served on the New England Telephone Company.

1. Federal Defendants Motion for Summary Judgment.

Plaintiffs have filed no opposition to this motion, as required by Local Rule 56.1. The federal agents and the Assistant United States Attorney have file affidavits to the effect that there were no intercepted telephone conversation in connection with their investigation of the plaintiffs, other than conversation which were taped with the consent on one of the parties. The testimony at the criminal trial of two of the plaintiffs an the ruling of the court in that trial was the same effect. The amended complaint is verified, but only "on information and belief," and therefore does not qualify as an affidavit sufficient to defeat summary judgment. Moreover, the complaint contains no more than an

unsupported surmise that the agents had information which they could only have obtained by intercepting telephone conversations; the sworn statement of the federal agents that the information was gleaned from the plaintiffs' telephone accounts is nowhere contradicted. Tina Breault testified in the criminal trial that she recorded a telephone conversation that she had with Kevin Noone, and that her prior statement to the contrary was a mistake. The plaintiffs have offered nothing to refute this statement.

Plaintiffs offer hearsay testimony that there was "interference" on their telephone lines, but there is no indication that this "interference", whatever it was, was caused by the defendants.

Summary judgment "is a useful device for...putting a swift end to meritless litigation." Wuinn v. Syracuse Model Neighborhood Corp., 613 F2d 438, 445 (2d

Cir. 1980). See also Celotex Corp. v. Catrett, 477 U.S. 317, 322(1986). The party moving for summary judgment must affirmatively demonstrate the absence of a genuine issue of material fact. The opponent, on the other hand, "may not rest upon the mere allegations or denials of his pleading, but... must set forth specific facts showing
that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U. S. 242, 248 (1986). An issue is "genuine" if a reasonable finder of fact could find for the opponent on the evidence presented, and "material facts" are those that might effect the outcome of the litigation under applicable substantive law. id. The curt must view the record in the light most favorable to the opponent of the motion and must indulge all inferences in his favor. Oliver v. Digitial Equipment Corp., 846 F.2d 103,105 (1st Cir. 1988). However, "[t]the

evidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a fact finder must resolve at an ensuing trial." Mack v. Great Atlantic and Pacific Tea Co., Inc., 871 F.2d 179, 181(1st Cir. 1989).

Application of the foregoing rules to the record in this case, and the failure of the plaintiffs to comply with Local Rule 56.1, require that the federal defendants' motion for summary judgment be allowed.

II. Motion for Default Judgment.

The plaintiffs have moved for default judgments against the Private Investigating Firm of Tony Frost, Tony Frost and Pat Hines. Pat Hines is alleged to have reviewed and "signed off" the reports submitted by the other federal defendants, Tony Frost and his firm are said to have conspired with the federal defendants to

conceal the illegal interception of the plaintiffs' telephone conversations. A certificate of service by mail was filed as to all the defendants, but there is no record of an acknowledgment by the Frost defendants or of any further effect to effect service, as required by Fed R. Civ. P. 4 as it existed prior to December 1, 1993. Accordingly, the motion to default these defendants is denied, and the complaint is dismissed with respect to these defendants. Pat Hines filed a motion to dismiss, which was initially denied. In view of my allowance of summary judgment as to the federal defendants, the order denying Hines' motion to dismiss is vacated, and his motion to dismiss allowed. The plaintiffs' motion for a default judgment is denied in its entirety.

III. Plaintiffs Motion to Enforce a Subpoena.

It follows from the foregoing that the

Memorand and order of October 21, 1994

The court contradicted itself and had no basis upon which to affirm Judges Skinners order which held that plaintiff had prior knowledge of the claims it sought to allege. The court having considered the submissions of the parties without oral argument; and it dismissing the complaint because it was barred by the Statute of Limitations. The court being of the opinion that plaintiffs have not presented any factual matters that could not have been proven.

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plaintiffs' motion to enforce a subpoena duces tecum served on the New England Telephone Co., is moot, there being nothing left of the action, In any case, the purported subpoena was a subpoena to appear at trial, giving no place and time of return, so that if was not enforceable in any case.

IV. Conclusion

The motion of the federal defendants for summary judgment is allowed. The action is dismissed as to all the remaining defendants. The plaintiffs' motion to enforce a subpoena is denied.

Final judgment shall enter in favor of all of the defendants with respect to the entire case.

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United States District Judge

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Benanti v. U.S. N.Y. 1957, 78 S.Ct. 155, 355 U.S. 96, 2 L.Ed. 2d 126

Weiss v. U.S. N.Y. 1939, 60 S.C. 269, 308 U.S. 321, 84, L.Ed. 298.

A claim accurse when the plaintiffs "knows, or has reason to know", of the injury on which the action is based"

Woodcock v. American Invest. Co

the statute of limitations applies where actions were not concealed Issues of un-conterverted facts to support allegations should not be resolved on motion for summary judgment in favor of Defendants\Appelees.
Bowen v. Eli Lilly & Co.

Where Respondents discover or an earlier date should have reasonably discovered that they were harmed or may have been harmed by defendant's actions
Barrett v. United States

Unconstitutional deprivation of a cause of action occurs when Defendants thwart vindication of claim by violation basic principles that enable civil claimants to assert their right effectively.
Cajigas v. Banco de Ponce, 741 F2d 464, 470n.13 (1st Cir. 1984)

Allegations made in a time-barred claim "may constitute relevant background evidence" for the other claimes.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94.1988
No. 94-2130

MARION FARRELL NOONE, ET AL
Plaintiffs - Appellants

v.

NEW ENGLAND TELEPHONE, ET AL
Defendants - Appellees

JUDGMENT

Entered: June 8, 1995

These causes came on to be submitted on the briefs and the original record on appeal from the United States District Court for the District of Massachusetts.

Upon Consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

_____
Clerk

cc: Marion Farrell Noone
Joseph F. Noone
John V. Woodard, Esq.
Pamela A. Smith, Esq.
Donald K. Stern. Esq.
Philip J. Callan, Esq.

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[NOT FOR PUBLICATION]

United States Court of Appeals
For the First Circuit

No. 94-1988

MARION FARRELL NOONE, ET AL.,

Plaintiffs, Appellants,

v.

NEW ENGLAND TELEPHONE, ET AL.,

Defendants, Appellees.

No. 94-2130

MARION FARRELL NOONE, ET AL.,

Plaintiffs, Appellants,

v.

NEW ENGLAND TELEPHONE, ET AL.,

Defendants, Appellees.

APPEALS FROM THE UNITED STATES

DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Walter J. Skinner,

Senior U.S. District Judge]

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Before

Torruella, Chief Judge,

Selya and Cry, Circuit Judges

Marion Farrell Noone and Joseph F. Noone, III on brief pro se.

Donald K. Stern, United States Attorney, an Susan G. Winkler, Assistant United States Attorney, on brief for defendants/appellees, Pat Hynes, Paul Desmond, Martin Marciniak, Mark Mahar, Kenneth Varriale, Paul Flynn, and Thomas Lyster.

John v. Woodard and Powers & Hall Professional Corporation, on brief for defendants/appellees Middleburgh Telephone Company Randall F. Becker and Barbara Becker.

Pamela A. Smith on brief for defendants/appellees, New York Telephone Company, Richard A. Jalkut and Daniel J. Murphy.

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Pamela A. Smith on brief for defendants/appellees, New England Telephone and telegraph Company, Paul O'Brien, Robert Jacobs, Nancy Kinton and William McManus.

Pahilip J. Callan, Jr, Michael K. Callan, Kevin M. Walkowski, and Doherty, Wallace, Pillsbury & Murphy, P. C., on brief for defendants/appellees, James Collins, Harry Miles and Growhoski, Callahan & Miles.

June 8, 1995

Per Curiam. We have reviewed the parties' briefs and the record on appeal. We deny appellants' motions to strike the briefs of the federal defendants-appellees, New England Telephone Company, and New York Telephone Company.

We affirm essentially for the reasons stated in the districts court's memoranda and orders, dated February 23, 1994, June 8, 1994, and October 20, 1994.

Affirmed.

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DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

AFFIDAVIT

Tina M. Breault, date of Birth December 13, 1969.

RESIDE: at 42 Harvard Street, 2nd Floor, Chicopee Falls, Massachusetts, Telephone Number 594-2828. On January 26, 1988, I was given a Subpoena for Federal Court by Agents at my parents House in Three Rivers. Later I went Back to 42 Harvard Street and my mother went with me. My Mother was in the living Room and I was taking on the Telephone to Joe Dalpe, Joe got arrested earlier in that day and was in jail. While on the phone, there was a knock on the door and I asked who it was. Kevin Noone answered I ended my conversation with Joe because if Kevin knew I was talking with Joe then he would want to talk to him. I let Kevin in. He didn't seem to know that Joe had been arrested. I told Kevin that I had gotten a subpoena to

E1

testify. He asked me if I talked or if I was going to talk. I told him I didn't know if I was going to talk. I told Kevin that Joe didn't do it so I'm not going to let him take the rap for somebody. He told me that I better not talk or I'm going to end up dead. he asked if I had a family and I told him I did. He then said that my family will get taken care of too. He said that I was going to get myself hurt. Kevin said that he would have to

..... 2 pages.....

Executed on 1-27 1988

SIGNATURE OF AFFIANT

_____

Tina Breault
SCRIBE AND SWORN TO BEFORE ME THIS 27TH

DAY OF JANUARY 1988

AT SPRINGFIELD, MA.

SIGNATURE

KENNETH M. VARRIALE
SPECIAL AGENT

SIGNATURE

THOMAS LYSTER
SPECIAL AGENT

E2

Get his kids out of the country if I talked he said that a guy by the name (Buford)crossed out Gary put out contracts on people I said I said do you mean Buford and he said yea. I've hard Kevin talk about Buford is suppose be a guy in the Mafia Kevin was afraid if I talked and joe talked then he would come down on him. Kevin told me to plead the fifth and that they couldn't do anything except hold me. I was scared because Kevin always carried a gun in a shoulder holster. He also said that if anybody talked, they would be taken care of. Kevin was decently threatening me. On January 28, 1988, at about 7: AM, I got a phone call the caller said he was Kevin, and I recognized his voice. He said that he wasn't calling form his home. he told me that I better plead the fifth or I would be taken care of.

SIGNATURE OF AFFIANT
Tina Breault

DATE
1-27-88

E3

MASTER DETECTIVE & PATROL AGENCY
INVESTIGATIONS & SECURITY 275 BOSTON POST RD. EAST SUIT 27 MARLBORO, MA. 01752
(617) 485-8520

Ms Linda Moduc
109 High St.
Thorndike, MA. 01069

JULY 8, 1988

DEAR MS. MODUK,

Following is a chronological list of findings with reference to your request for checking your phones for taps.

6/9/88 5:05 PM BARN PHONE CHECKED BY AGENT "S" & "B". VOLTAGE FOUND TO BE 14 VOLTS BELOW NORMAL (36 VOLTS).

6/1188 9:00 AM BONNIES PHONE CHECKED O.K AT THIS TIME ALSO ATTEMPTED TO CHECK BROWNS PHONE. NO ONE HOME.

6/21/88 7:70 PM EXTENSIVE CHECK OF SUP'S HOME AND BARN PHONES. HOME PHONE VOLTAGE SLIGHTLY LOW (47), SCOPE CHECK DEFINITELY CONFIRMED A TAP WAS IN PROGRESS AT THE TIME OF OUR CHECK. FURTHER, A "BUG" CHECK WAS MADE OF THE

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RESIDENCE WITH NEGATIVE RESULTS.

9:25 PM EXTENSIVE CHECK OF BARN PHONE CHECKED WITH NEGATIVE RESULTS. "BUG" CHECK WAS MADE OF THE BARN WITH NEGATIVE RESULTS.

6/27/88 7:05 PM MULTIPLE PHONE CHECKS MADE AS FOLLOWS:

BONNIE'S HOUSE	NEGATIVE
ANDERSONS HOUSE	NEGATIVE
SADUSKY HOUSE	NEGATIVE
BARN	NEGATIVE
SPUD'S HOUSE	NEGATIVE

CONSIDERING THE RESULTS OF THE 6/27/88 SWEEP, IT IS MY OPINION THAT NO TAPS OF ANY SORT EXIST ON ANY OF THE INVOLVED TELEPHONE LINES. ALL VOLTAGES WERE AT OR SLIGHTLY ABOVE NORMAL AND NO FLUCTUATIONS WERE RECORDED.

WITHOUT QUESTION, YOUR HOME PHONE AND THE BARN PHONE HAVE HAD A "TAP" PLACED ON THEM ON 6/9/88 AND 6/21/88. IT APPEARS THAT THE INDIVIDUALS WHO PLACED THE TAPS BECAME

AWARE OF YOUR CHECKING THE LINES AND REMOVED THE TAPS TO AVOID BEING DISCOVERED.

OVERVIEW:

THE PHONES IN YOUR HOME AS WELL AS THE BARN WERE DEFINITELY BEING TAPPED ON 6/9/88 AND 6/21/88. EFFORTS TO ASCERTAIN EXACTLY WHO WAS INVOLVED WERE THWARTED BY THE FACT THAT THE TAPS WERE REMOVED DURING OUR SUPPLEMENTAL INQUIRY WITH THE PHONE COMPANY.

AS I HAVE RECOMMENDED TO YOU AS WELL AS MARION, I FEEL YOU SHOULD PETITION YOUR LOCAL TELEPHONE COMPANY FOR ANY INFORMATION THEY MAY HAVE REGARDING THE POSSIBILITY OF A COURT ORDER FOR SAID TAPS. THE PHONE COMPANY HAS AN OBLIGATION TO PROVIDE YOU WITH ANY AND ALL INFORMATION THEY MAY HAVE WITH REGARD TO THIS CASE.

RESPECTFULLY YOURS;

_____

TONY FROST, OWNER

NEW ENGLAND TELEPHONE
A NYNEX COMPANY
313 CONGRESS STREET 3rd FLOOR
BOSTON, MASSACHUSETTS 02210
Phone (617) 737-0900

July 11, 1988

Ms. Linda Mowduk
109 High Street
Thorndike, MA. 01079

Dear Ms. Mowduk:

Regarding our telephone conversation of July 8, 1988 I am forwarding this letter per your request.

Since the Security Department of New England Telephone had no knowledge of any wiretap inspection being conducted at your premises, we can neither confirm or deny that any evidence of an illegal wiretap existed from November of 1987 to date.

Very truly yours

Nancy L. Kinton
Staff Director

G1

Mario D. V. Pecoraro
P.O. Box 417
Schenectady, New York 12301
Phone: (518) 374-2071

May 21, 1989

TO WHOM IT MAY CONCERN

On Saturday, October 8, 1988, I conducted a "Telephone Sweep", in an effect to determine whether any listening devices were attached to the telephone line at the residence of Marion Farrell Noone, Star Route 30, Middleburgh, new York. The telephone number was (518) 827-4447. The examination of the line was conducted at approximately 8:00 A.M.

The examination was mutifunctional in nature, consisting of testing of line impedance, resistance, voltage variations and "tone tripping". Examination of the exterior of the premises, wherein the telephone lines enter the residence, commonly known as the "switching box", revealed that there were two lines, both

active and "alive", entering said switch box and departing from it. both lines continued in the direction of the poles which accommodate the residence. This is highly unusual and customarily indicative of "telephone monitoring".

The technical examination of the lines revealed that the lines were "coupled" at the "switch box". The voltage testing reflected an "normal" 100+ or -, while the line(s) was inactive. When the line (s) lines(s). Simultaneously, the line "resistance factor" increased drastically and the impedance registered "activity". In addition, upon retaining the circuit in a "closed" basis, and "tripping" the line, the same activities registered as though the lines(s) was in actual use.

The above testing was conducted on three (3) separate occasions, between the time of approximately 8:15 A.M. and 10:00

A.M. The conditions of the telephone lines(s) as they were at the time was clearly indicative that some form of a listening device was in place at the time, at the afore-mentioned residence.

On Saturday, November 19, 1988, the same type of testing was performed at the following addresses:

Joseph "Spud" F. Noone, III
Karrion Farm
Old Warren Road Palmer, massachusetts
Telephone: (413) 283-7159
Time 12:00 Noon

Linda Mowduk and Joseph "Spud" F. Noone III
109 High Street
Thorndike, Massachusetts
Telephone: (413) 283-4800
Time: 1:26 P.M.

Jane Pollizze
62 Church Street
Ware, massachusetts
Telephone: (413) 967-7576
Time 2:13 P.M.

Bonnie and Kevin Noone
Route 67
West Warren, massachusetts
Telephone: (413) 436-7814
Time 2:53 P.M.

The "Y" Pharmacy (Place of employment of Linda Mowduk)
732 Chicopee Street
Chicopee, massachusetts
Telephone: (413) 532-5224
Time 6:00 P.M.

All of the above-listed telephones, with the exception of that of Jane Pollizze reflected the same technical condition(s) as that of Marion Farrell Noone, All of the findings were consistent.

Very Truly yours

_____

Mario D. Pecoraro

H4

Mario D. Pecoraro
P.O. Box 417
Schenectady, New York 12301

April 16, 1990
Mr. Stephen Wachtler
90 Johnston Road
Slingerlands, New York

Re Telephone Number	(518) 456-8362
Address	90 Johnston Road Slingerlands, New York
Date of Testing	March 3, 1990
Time	6:10 P.M.

Dear Sir:

On the above date, I conducted a test on the above-captioned telephone number at the address listed above, to determine whether any impedance and\or line voltage variation normally associated with telephone monitoring activities, existed on said line.

The various tests conducted revealed that at the time, the telephone line in question reflected "line disturbances" which gave a high probability of some forme of line interference. The location of said cause of interference was not determined.

Very Truly yours.

Mario D. Pecoraro

I-1

Mario D. Pecoraro
P.O. Box 417
Schenectady, New York 12301

April 16, 1990
Mrs. Marion Noone
Star Rte. 30 - Box 972
Middleburgh, New York 12122

RE:Telephone Number (518) 827-4447
Address Star Rte. 30 - Box 972
Middleburgh,New York

Date of Testing March 3, 1990
Time: 2:55 P.M.

Dear Madam:

On the above date, I conducted a test on the above-captioned telephone number at the address listed above, to determine whether any impedance and\or line voltage variation normally associated with telephone monitoring activities, existed on said line.

The various tests conducted revealed that at the time, the telephone line in question reflected "line disturbances" which gave a high probability of some forme of line interference. The location of said cause of interference was not determined.

Very Truly yours.

Mario D. Pecoraro

I2

Mario D. Pecoraro
P.O. Box 417
Schenectady, New York 12301

April 16, 1990
Ron Smith Health Food Store
Route 20, Guilderland, New York

Re Telephone Number (518) 456-0429
Address Route 20
Guilderland, New York

Date of Testing March 3, 1990
Time 7:00 P.M.

Dear Sir:

On the above date, I conducted a test on the above-captioned telephone number at the address listed above, to determine whether any impedance and\or line voltage variation normally associated with telephone monitoring activities, existed on said line.

The various tests conducted revealed that at the time, the telephone line in question reflected "line disturbances" which gave a high probability of some forme of line interference. The location of said cause of interference was not determined.

Very Truly yours.

Mario D. Pecoraro

I3

Mario D. Pecoraro
P.O. Box 417
Schenectady, New York 12301

April 16, 1990
Linda Mowduk & Joseph Noone III
109 High Street
Thorndike, Massachusetts

RE: Telephone Number (514) 283-4800
Address 109 high Street
Thorndike, Massachusetts

Date of Testing March 10, 1990
Time 3:15 P.M.

Dear Sir:

On the above date, I conducted a test on the above-captioned telephone number at the address listed above, to determine whether any impedance and\or line voltage variation normally associated with telephone monitoring activities, existed on said line.

The various tests conducted revealed that at the time, the telephone line in question reflected "line disturbances" which gave a high probability of some forme of line interference. The location of said cause of interference was not determined.

Very Truly yours.

Mario D. Pecoraro

J1

Mario D. Pecoraro
P.O. Box 417
Schenectady, New York 12301

April 16, 1990
Mr. Joseph Noone III, Karrie-On-Farm
Old Warren Road
Palmer, Massachusetts

Re Telephone Number	(413) 283-7159
Address	Karrie-On-Farm Old Warren Road Palmer, Massachusetts
Date of Testing	March 10, 1990
Time	4:18 P.M.

Dear Sir:

On the above date, I conducted a test on the above-captioned telephone number at the address listed above, to determine whether any impedance and\or line voltage variation normally associated with telephone monitoring activities, existed on said line.

The various tests conducted revealed that at the time, the telephone line in question reflected "line disturbances" which gave a high probability of some forme of line interference. The location of said cause of interference was not determined.

Very Truly yours.

Mario D. Pecoraro

J2

Mario D. Pecoraro
P.O. Box 417
Schenectady, New York 12301

April 16, 1990
Mr. Stanley J. Malek, Jr.
32 Rugby Street
Holyoke, Massachusetts

Re Telephone Number	(413) 539-2566
Address	32 Rugby Street Holyoke, Massachusetts
Date of Testing	March 10, 1990
Time	12:50 P.M.

Dear Sir:

On the above date, I conducted a test on the above-captioned telephone number at the address listed above, to determine whether any impedance and\or line voltage variation normally associated with telephone monitoring activities, existed on said line.

The various tests conducted revealed that at the time, the telephone line in question reflected "line disturbances" which gave a high probability of some forme of line interference. The location of said cause of interference was not determined.

Very Truly yours.

Mario D. Pecoraro

J3

Mario D. Pecoraro
P.O. Box 417
Schenectady, New York 12301

April 16, 1990
Mr. and Mrs. Kevin Noone
Route 67, P.O. Box 544
West Warren Massachuestts

RE: Telephone Number (413) 436-7814
Address Route 67 P.O. Box 544
West Warren, MA.

Date of Testing March 10, 1990
Time 4:40 P.M.

Dear Sir:

On the above date, I conducted a test on the above-captioned telephone number at the address listed above, to determine whether any impedance and\or line voltage variation normally associated with telephone monitoring activities, existed on said line.

The various tests conducted revealed that at the time, the telephone line in question reflected "line disturbances" which gave a high probability of some forme of line interference. The location of said cause of interference was not determined.

Very Truly yours.

Mario D. Pecoraro

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